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Separation of Powers in Ohio: A Critical Analysis

Curtis Rodebush

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SEPARATION OF POWERS IN OHIO: A CRITICAL ANALYSIS

CURTIS RODEBUSH¹

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The separation of powers doctrine has, in recent years, become a popular concept with the Ohio Supreme Court. The court cited the doctrine as the reason for invalidating portions of Ohio's newly revamped criminal code² and wielded it when striking down one of Ohio's most comprehensive tort reform bills.³ Despite its

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²See *State ex rel. Bray v. Russell*, 89 Ohio St. 3d 132, 729 N.E.2d 359 (2000) (finding "bad-time" provisions of the Ohio Criminal Code invalid under a separation of powers theory).

³See *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999) (striking down House Bill 350 for, *inter alia*, separation of powers violations).

frequent application, confusion over the doctrine's application abounds⁴ and is not limited to deciding what cases warrant its implementation, but how strictly its letter should be adhered to.⁵

Admittedly, scholarship that analyzes separation of powers issues in a state context is lacking.⁶ Nonetheless, the doctrine is ripe for study in light of current litigation trends and judicial decision-making. The goal of this Article is to provide a basic framework from which to begin a separation of powers analysis under the Ohio Constitution. In addition, this Article offers some insights into how a separation of powers controversy should be dissected and suggests some directions that Ohio courts should take in the future.

Part I of this Article presents useful background information on the separation of powers doctrine, including its origin, its treatment in the Ohio Constitution, predominant theories of analysis, and relevant Ohio cases. Part II (A) hypothesizes a general approach with which to begin a separation of powers analysis. As will be shown in Part II (B) – (D), the Ohio Supreme Court has not always conducted a proper analysis under predominant separation of powers theories. Part III concludes by proposing that Ohio courts initially categorize a separation of powers case as one involving either administrative bodies, constitutionally decreed branches, or a combination thereof. From that point, courts should ask a series of questions associated with that particular genus of cases when deciding what method of review to implement.

I. THE EVOLUTION OF THE SEPARATION OF POWERS IN OHIO

A. *A Brief Look at Origins and Purpose*

The separation of powers doctrine requires that governmental power be constitutionally apportioned among co-ordinate branches of government—traditionally the legislative, executive, and judicial. In America the doctrine is considered an essential precept for civil liberty, and our federal government and every state in the Union follow its basic tenet.⁷ Ohio courts, while admitting that the Ohio Constitution contains no explicit language on the subject, have found the doctrine to be implicit within the Constitution's structure.⁸

⁴*See id.* at 526, 715 N.E.2d at 1119 (Moyer, C.J., dissenting) (stating “that doctrine [separation of powers] is not easily defined”).

⁵*See Bray*, 89 Ohio St. 3d at 137, 729 N.E.2d at 363 (Cook, J., dissenting); *Woods v. Telb*, 89 Ohio St. 3d 504, 518, 733 N.E.2d 1103, 1114 (2000) (Cook, J., dissenting). Both dissents argue for a permissive standard of review in all separation of powers cases.

⁶ “[A]n exploration of the academic literature indicates that, with some exceptions, leading contemporary scholars focus their attention mainly on the work of the federal courts.” Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1544 (1997).

⁷*See, e.g.*, WILLIAM O. DOUGLAS, *THE ANATOMY OF LIBERTY* 53-54 (1963).

⁸*See City of South Euclid v. Jemison*, 28 Ohio St. 3d 157, 158-59, 503 N.E.2d 136, 138 (1986) (“While Ohio, unlike other jurisdictions, does not have a constitutional provision specifying the concept of separation of powers, this doctrine is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government.”).

The celebrated Montesquieu, generally considered the father of separation of powers thought,⁹ observed that an executive or legislative organ, when in possession of both law making and law enforcing powers, is easily given to tyranny over the governed.¹⁰ The same tyranny, Montesquieu reasoned, reveals itself when the judiciary is annexed by another branch.¹¹ The Founding Fathers, motivated by a desire to preserve political liberty, adopted Montesquieu's concept and argued for its embodiment in the federal Constitution.¹² So it came that the doctrine of separation of powers ingrained itself in American political and legal science and, despite over 200 years of experimentation and refinement, the concept remains a firm and viable principle of constitutional law.¹³

B. *The Ohio Constitution—History and Structure*

The constitutional history of Ohio begins with the Northwest Ordinance of 1787. The Ordinance established a government structure that favored the executive branch or, more accurately, provided it with the means to become insufferable.¹⁴ Disdain for an uncompromising governor resulted in the Constitutional Convention of 1802 and the divestiture of gubernatorial power.¹⁵ The 1802 constitution placed hegemony in

⁹See WILLIAM BONDY, *THE SEPARATION OF GOVERNMENTAL POWERS IN HISTORY, IN THEORY, AND IN THE CONSTITUTIONS* 13 (1967). However, the doctrine cannot be entirely attributed to Montesquieu — and Plato, Aristotle, Polybius, Cicero, Machiavelli, Harrington, Locke, and Blackstone are all credited with aiding in its early development. See Malcom P. Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 386-93 (1935).

¹⁰See CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF LAWS* bk. 11, ch. 6 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. & trans., 1989) ("When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.").

¹¹"Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge could have the force of an oppressor." *Id.*

¹²See THE FEDERALIST NO. 47 (James Madison) (arguing for Montesquieu's theory of separation of powers to be reflected in the Constitution); THE FEDERALIST NO. 78 (Alexander Hamilton) (arguing for an independent judiciary).

¹³See generally Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175 (1990) (detailing the history of the doctrine, recent judicial interpretations, and arguing for a greater deference to legislative and executive, as opposed to judicial, interpretation).

¹⁴See Frederick Woolbridge, *A History of Separation of Powers in Ohio: A Study in Administrative Law*, 13 U. CIN. L. REV. 191, 199-208 (1939). For eleven years the executive branch and the judiciary shared duties until the establishment of a legislature in 1798. Even after the establishment of the legislature, then-governor Arthur St. Clair retained the power of absolute veto which, in addition to his other powers, he often abused. See *id.* at 206-08.

¹⁵See 3 EMILIUS O. RANDALL & DANIEL J. RYAN, *HISTORY OF OHIO* 115 (1912).

the legislature, although Ohio citizens soon realized that a powerful general assembly was no better than a powerful governor.¹⁶

The result was the Constitutional Convention of 1851, the debates of which were peppered with criticisms of the then-dominant general assembly.¹⁷ The constitution that followed, with amendments, remains in force.¹⁸ Although its text does not address the issue, the structure of the Ohio Constitution requires that legislative, executive, and judicial powers be divided among the respective branches of government and, as an accepted corollary, that those powers be kept essentially separate. Article II states that the “legislative power of the state shall be vested in a general assembly.”¹⁹ Article III requires that “[t]he supreme executive power of this state shall be vested in the governor.”²⁰ Article IV vests judicial power “in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the Supreme Court as may from time to time be established by law.”²¹

C. Separation of Powers Theories

Ohio, like other jurisdictions, has struggled to develop a workable theory with which to analyze its separation of powers doctrine.²² The basic principle—that one

¹⁶See Woolbridge, *supra* note 14, at 217 (“The governor was given a minimum of power. The courts were to a great extent in the hands of the legislature so far as appointment, salary, and in many cases, jurisdiction were concerned. The legislature was all powerful.”). See also State *ex rel.* Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St. 3d 451, 462-67, 715 N.E.2d 1062, 1076-79 (1999) (detailing the results and citizen reactions under an overbearing legislature).

¹⁷See generally REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO (J.V. Smith, reporter 1937) [hereinafter 1851 DEBATES]. See also State *ex rel.* Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St. 3d at 464-66, 715 N.E.2d at 1078 (citing specific “anti-legislature” comments). It should be noted that the 1851 convention debates centered around limiting the general assembly’s power through checks and balances rather than a further refinement of the separation of powers doctrine. In discussing the proposed veto power of the governor under the new constitution, a Mr. Hitchcock of Geauga County argued, “I suppose there should be three powers in the government, separate and distinct from each other. . . . Now sir, it does seem to me inconsistent with our theory of government, to mix up the duties of the various departments in the manner proposed in the proposition under consideration, and therefore I object.” See 1 1851 DEBATES, *supra*, at 125. Although it would seem that granting an executive officer the ability to influence law making by exercising a veto is contrary to separation of powers, the principle of checks and balances operates in elegant partnership with the doctrine to further ensure, by way of inter-branch policing, that no one governmental faction becomes too strong. See THE FEDERALIST NO. 47 (James Madison) (stating that Montesquieu did not intend for the branches to be entirely separate, and citing numerous examples of checks and balances in the various state constitutions).

¹⁸See 16 OHIO JUR. 3d 154, § 4.

¹⁹OHIO CONST. art. II, § 2.01.

²⁰OHIO CONST. art. III, § 3.05.

²¹OHIO CONST. art. IV, § 4.01.

²²Indeed, even the federal courts have been inconsistent in their separation of powers reasoning. See, e.g., Peter L. Strauss, *Bowsher v. Synar: Formal and Functional Approaches*

branch may not interfere with, encroach upon, or exercise powers delegated to another branch of government²³—seems simple enough, but defining those powers is often difficult.²⁴ The Ohio Constitution vests executive, legislative, and judicial power in their respective branches along with other ancillary powers²⁵ and inter-branch checks.²⁶ The ancillary powers and their concomitant checks and balances are distinct, but often what constitutes judicial, executive, or legislative power and when that power is being usurped is not as clear.²⁷

Two theories dominate within this “twilight zone”²⁸ where the constitution does not provide a clear pronouncement. The first is formalism, generally considered to impose bright-line limitations on governmental actors and promote predictability and consistency through faithful interpretation of constitutional text, history, and original understanding.²⁹ The other is functionalism, which advocates a balancing of

to *Separation-of-Powers Questions — A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987) (describing how the U.S. Supreme Court has waffled between a formalist and functionalist approach).

²³“The legislative, executive and judicial branches of government are separate and distinct and neither may impinge upon the authority or rights of the others; such branches are of equal importance; and each in exercising its prerogatives and authority must have regard for the prerogatives and authority of the others.” *State ex rel. Finley v. Pfeiffer*, 163 Ohio St. 149, 126 N.E.2d 57 (1955) (syllabus).

²⁴“The distribution of powers among the legislative, executive, and judicial branches of the government, is, in a general sense, easily understood; but no exact rule can be laid down, *a priori*, for determining, in all cases, what powers may or may not be assigned by law to each branch.” *State ex rel. Judson v. Harmon*, 31 Ohio St. 250, 258 (1877).

²⁵An example of an ancillary power of the judicial branch is the right of the supreme court to “appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court.” OHIO CONST. art. IV, § 5(A)(2). This is in addition to the “judicial power” which is vested in the courts. OHIO CONST. art. IV, § 1.

²⁶One example of a judicial check on the executive branch is the judiciary’s sole jurisdiction in determining the governor’s inability to execute powers of the office. *See* OHIO CONST. art. III, § 22. It should again be noted that checks and balances do not efface the separation of powers doctrine, but instead add to or condition it. *See supra* note 17; *see also* *State ex rel. Trauger v. Nash*, 66 Ohio St. 612, 617-18, 64 N.E. 558, 559 (1902) (“The legislative, executive and judicial departments of the state government are not so absolutely distinct that an arbitrary exercise of power, or what is the same thing, an arbitrary refusal to exercise power, could not be checked or opposed by either of the other departments. Such a theory is opposed to the principle of checks and balances upon which the federal and state constitutions have been framed.”).

²⁷“What are legislative powers, or what are executive or judicial powers is not defined or expressed in the constitution, except in general terms. The boundry line between them is undefined, and often difficult to determine.” *State ex rel. Att’y Gen. v. Peters*, 43 Ohio St. 629, 647, 4 N.E. 81, 85 (1885).

²⁸Justice Jackson aptly described separation of powers concerns that were not black or white as being within a “zone of twilight.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

²⁹*See generally* Martin H. Redish & Elizabeth J. Cisar, “*If Angels were to Govern*”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 1991 DUKE L.J. 449.

standards and policy goals to provide public actors with greater flexibility. Often a rigid demarcation of duties will be abandoned under a functionalist approach in favor of examining the quality of relationships between various branches of government.³⁰ Each approach also has its own shortcomings. A formalistic approach can give disproportionate weight to a legal factor that has little practical significance, while functionalism can lead to extremely divergent results even among like-minded judges.³¹

The most illuminating use of these theories is seen in *Bowsher v. Synar*.³² *Bowsher* involved the Balanced Budget and Emergency Deficit Control Act of 1985 (the “Act”), which established a maximum deficit amount for fiscal years 1986 through 1991.³³ Should the federal deficit exceed the amount prescribed by the Act, the Directors of the Office of Management and Budget (“OMB”), the Congressional Budget Office (“CBO”), and the Comptroller General were required to initiate spending cuts.³⁴ Both the OMB and CBO were to submit a report detailing budget reductions to the Comptroller General,³⁵ and after reviewing the reports the Comptroller General was to submit his recommendations to the President. The President, in accordance with the Act, would then implement these recommendations if Congress failed to remedy the budget infirmities on its own.³⁶

The problem was that the Comptroller General was assigned an executive function, namely the implementation of the deficit control law, while the Act provided for the Comptroller General’s removal by a joint resolution of Congress or impeachment.³⁷ Although the U.S. Constitution allows the removal of an executive officer through impeachment,³⁸ it does not permit removal based on a joint resolution of Congress.³⁹ The majority, using a formal approach, found that removal by a joint resolution permitted Congress to “remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress.”⁴⁰ Theoretically, Congress could unilaterally remove an executive officer without the consent of the President, which was antithetical to the doctrine of separation of powers because it allowed the legislature to control an official exercising executive power.

³⁰See generally Strauss, *supra* note 22.

³¹See Entin, *supra* note 13, at 212.

³²478 U.S. 714 (1986).

³³See *id.* at 717.

³⁴See *id.* at 718.

³⁵See *id.*

³⁶See *id.*

³⁷See *Bowsher*, 478 U.S. at 720.

³⁸U.S. CONST. art. II, § 4 allows for the impeachment of U.S. officers for “Treason, Bribery or other high Crimes and Misdemeanors.”

³⁹See *Bowsher*, 478 U.S. at 723. The Act allowed a joint resolution of Congress to be passed for permanent disability, inefficiency, neglect of duty, malfeasance, or a felony or conduct involving moral turpitude. See *id.* at 728.

⁴⁰*Id.* at 726.

Justice White, writing in dissent, used a functional analysis when reviewing the constitutionality of the Act. He noted that a joint resolution of Congress must not only be approved of by both Houses, but also signed by the President.⁴¹ Should the President feel that the Comptroller General's removal is not required, a two-thirds vote in each House would be required to override the presidential veto.⁴² Because of the practical difficulties in passing a joint resolution, Justice White found it unlikely that the Comptroller General would be influenced or unilaterally removed by Congress.⁴³ As a result, any threat to the separation of powers was wholly illusory.⁴⁴

Despite their dichotomy, both formalism and functionalism are useful tools when analyzing constitutional issues and neither should be thought to be exclusive of the other.⁴⁵ Indeed, Ohio courts have used both approaches when examining the separation of powers.⁴⁶ Two early separation of powers cases, both of which are frequently cited authorities on the matter, express seemingly polar views as to how a separation of powers case should be analyzed. The Ohio Supreme Court declared a seemingly functionalist rule in *City of Zanesville v. Zanesville Telephone and Telegraph Co.*,⁴⁷ by stating "any encroachment by one upon the other, is a step [but not a leap] in the direction of arbitrary power."⁴⁸ However, that same court employed formalist language in *Hale v. Ohio*⁴⁹ when it asserted that "the people possessing all governmental power adopted constitutions completely distributing it to appropriate departments."⁵⁰ Needless to say, regardless of the approach a court chooses to take, judges should necessarily be wary of their unique role when examining separation of powers cases in which the judiciary is an interested party.⁵¹

⁴¹See *id.* at 771 (White, J., dissenting).

⁴²Justice White described such a situation as "a feat of bipartisanship more difficult than that required to impeach and convict." *Id.* (White, J., dissenting).

⁴³"The requirement of Presidential approval obviates the possibility that the Comptroller will perceive himself as so completely at the mercy of Congress that he will function as its tool." *Id.* (White, J., dissenting).

⁴⁴"Realistic consideration of the nature of the Comptroller General's relation to Congress thus reveals that the threat to separation of powers conjured up by the majority is wholly chimerical." *Id.* at 774 (White, J., dissenting).

⁴⁵See William N. Eskridge, Jr., *Relationships between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21 (1998) (arguing that formalism and functionalism are both useful and can even be used simultaneously in analyzing a single problem).

⁴⁶See Woolbridge, *supra* note 14, at 192 ("Often the same court will express different views at different periods of time, or under varying factual situations.").

⁴⁷63 Ohio St. 442, 59 N.E. 109 (1900).

⁴⁸*Id.* at 451, 59 N.E. at 110.

⁴⁹55 Ohio St. 210, 45 N.E. 199 (1896).

⁵⁰*Id.* at 214, 45 N.E. at 200.

⁵¹See 16 C.J.S. *Constitutional Law* § 170 (1983) ("[T]he courts, being the final interpretative bodies as to constitutional matters, must exercise extreme care and caution when declaring their own powers under the constitution."). One may question whether the judiciary, as an interested party, is capable of making a truly impartial ruling when carving out its own

D. Ohio Separation of Powers Examples

1. Judicial vs. Executive/Administrative

In *State ex rel. Bray v. Russell*,⁵² the Ohio Supreme Court outlawed “bad-time” penalties as an unlawful encroachment on judicial power by the executive branch.⁵³ The bad-time penalties, authorized by section 2967.11 of the Ohio Revised Code, allowed parole boards to punish any crime committed by a prisoner while serving his or her prison term by “extending the . . . term for a period of fifteen, thirty, sixty, or ninety days.”⁵⁴ The court ruled that the statute permitted the “executive branch to prosecute an inmate for a crime, to determine whether a crime has been committed, and to impose a sentence for that crime.”⁵⁵ Since the “determination of guilt . . . and sentencing of a defendant convicted of a crime are solely the province of the judiciary,” the court found it necessary to negate the bad-time provision.⁵⁶

In reaching its conclusion, the majority summarily rejected a functionalist approach advanced by the state. In *State ex rel. Plain Dealer Publishing Co. v. City of Cleveland*,⁵⁷ the Ohio Supreme Court stated that “the separation of powers doctrine . . . applies only when there is some interference with another governmental branch.”⁵⁸ *Plain Dealer* involved a newspaper’s attempt to compel the Cleveland mayor’s office to produce the names of candidates applying to become Cleveland’s next chief of police.⁵⁹ The Court ultimately found that the separation of powers doctrine, as embodied in the Ohio Constitution, was inapplicable to local governments.⁶⁰ The *Bray* court labeled the *Plain Dealer* language as dicta and asserted that the separation of powers principle was designed to protect individuals rather than governmental branches.⁶¹ However, immediately after rejecting a rule

turf. See Frederick Schauer, *Incentives, Reputation, and Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000) (hypothesizing that judges may make decisions based on selfish motives such as wishing to expand one’s power base but admitting that empirical evidence for this hypothesis is lacking).

⁵²89 Ohio St. 3d 132, 729 N.E.2d 359 (2000).

⁵³*See id.* at 136, 729 N.E.2d at 362.

⁵⁴OHIO REV. CODE § 2967.11. This change was part of a broad overhaul in criminal sentencing known as the “truth in sentencing” law, enacted by the Ohio General Assembly in 1996. See Anne Michaud & Kristin Delguzzi, *Sentencing for Felonies Redefined*, CINCINNATI ENQUIRER, July 1, 1996, at A1.

⁵⁵*Bray*, 89 Ohio St. 3d at 135, 729 N.E.2d at 362.

⁵⁶*See id.* at 136, 729 N.E.2d at 362 (quoting *State ex rel. Att’y Gen. v. Peters*, 43 Ohio St. 629, 648, 4 N.E. 81, 86 (1885)).

⁵⁷75 Ohio St. 3d 31, 661 N.E.2d 187 (1996).

⁵⁸*Id.* at 38, 661 N.E.2d at 193 (citing *Sadler v. Oregon State Bar*, 550 P.2d 1218, 1222 (Or. 1976)).

⁵⁹*Id.* at 32, 661 N.E.2d at 188-89.

⁶⁰*Id.* at 37-38, 661 N.E.2d at 192.

⁶¹“The reason the legislative, executive, and judicial powers are separate and balanced is to protect the people, not to protect the various branches of government.” *Bray*, 89 Ohio St.

that called for an examination of branch interference, the court held that the exclusive province of the judiciary was intruded upon.⁶²

The dissent advocated what it termed a more “pragmatic, flexible approach.”⁶³ It stated that the focus should not be whether “the Parole Board’s delegated function could be described as ‘adjudicatory’ in nature” but instead whether “the ‘bad time’ statute prevents the judicial branch from accomplishing its constitutionally assigned functions.”⁶⁴ The dissent argued that the power conferred under section 2967.11 was within the domain of administrative powers and did not interfere with judicial functions.⁶⁵

The Ohio Supreme Court visited a similar issue when it upheld the parole board’s exercise of “post-release control.” In *Woods v. Telb*,⁶⁶ the court affirmed the constitutionality of section 2967.28 of the Ohio Revised Code, which allows the parole board to send certain felons back to prison for violations of post-release regulations.⁶⁷ In distinguishing post-release control from bad-time penalties, the court found it crucial that the post-release control statute required defendants to be

3d at 135, 729 N.E.2d at 362. This proposition is largely self-evident and does nothing to advance the inquiry. It is without question that law and government are created for the benefit and protection of citizens, not their institutions.

⁶²*See id.* at 136, 729 N.E.2d at 362. It would seem that the court in *Bray* applied the very rule that it rejected in the beginning of its opinion. The court did not reason that the executive branch could exercise judicial powers and at the same time *not* usurp the power of the judicial branch. Such reasoning would be undeniably awkward. Furthermore, the court did not directly analyze the rights of individuals under the “bad-time” provision to find a violation of the separation of powers. It would seem that while the underlying principle of the separation of powers is to protect individuals, this does not conflict with a rule that examines actions of the co-ordinate branches to find a violation.

⁶³*Bray*, 89 Ohio St. 3d at 137, 729 N.E.2d at 363 (Cook, J., dissenting) (referring to the approach advocated by James Madison in Federalist No. 47, the United States Supreme Court in *Nixon v. Administrator of Gen. Services*, 433 U.S. 425 (1977), and the Ohio Supreme Court in *State ex rel. Plain Dealer Publishing Co. v. City of Cleveland*, 75 Ohio St. 3d 31, 661 N.E.2d 187 (1996), and *State v. Hochhausler*, 76 Ohio St. 3d 455, 668 N.E.2d 457 (1996)).

⁶⁴*Bray*, 89 Ohio St. 3d at 137, 729 N.E.2d at 363 (Cook, J., dissenting). Although under the dissent’s reasoning the underlying objective is to determine if constitutionally assigned judicial functions have been usurped, this can best be done by analyzing the nature of the delegated power. Section 4.01 vests all judicial power in the various Ohio courts. OHIO CONST. art. IV, § 4.01. If judicial power is delegated to another branch, it would prevent courts from accomplishing their “constitutionally assigned function.” *Bray*, 89 Ohio St. 3d at 137, 729 N.E.2d at 363 (Cook, J., dissenting). Therefore, in order to determine if a statute is unconstitutional, courts would be wise to determine whether the delegated function was “judicial” in nature or “administrative.” The dissent seems to recognize this and argues that the powers delegated under OHIO REV. CODE § 2967.11 are a permissible exercise of administrative powers, despite the fact that those powers *could* be described as judicial. *See id.* at 137, 729 N.E.2d at 363 (Cook, J., dissenting).

⁶⁵*See Bray*, 89 Ohio St. 3d at 137, 729 N.E.2d at 363 (Cook, J., dissenting) (arguing that it is permissible for § 2967.11 to define bad-time violations as those which are crimes under the penal code and asserting that the parole board may punish infractions of those violations).

⁶⁶89 Ohio St. 3d 504, 733 N.E.2d 1103 (2000).

⁶⁷OHIO REV. CODE § 2967.28.

informed of the possibility of post-release control at his sentencing or plea hearing.⁶⁸ The majority held that post-release control was imposed by the judiciary while the executive branch merely oversaw its imposition.⁶⁹ If this is the only difference between bad-time and post-release control provisions, it raises the question of whether bad-time penalties would be constitutional if judges informed defendants of their possible imposition at the time of sentencing.⁷⁰ Clearly, *State ex rel. Bray v. Russell* and *Woods v. Telb* represent a strict form over function approach to the separation of powers doctrine.

2. Judicial vs. Legislative

In September 1996, the 121st Ohio General Assembly passed a major tort reform law known as H.B. 350.⁷¹ The tort reform measure, which was designed to impose “a ceiling on noneconomic and punitive damage awards in lawsuits, [shorten] the time for filing lawsuits and generally [protect] defendants in personal injury cases,”⁷² was signed into law in late October 1996. Even before it took effect, questions of the law’s constitutionality abounded.⁷³

H.B. 350 was eventually brought before the Ohio Supreme Court in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*.⁷⁴ After a brief review of Ohio’s

⁶⁸“Pursuant to [Ohio Revised Code §§] 2967.28(B) and (C), a trial court must inform the defendant at sentencing or at the time of a plea hearing that post-release control is part of the defendant’s sentence.” *Woods*, 89 Ohio St. 3d at 504, 733 N.E.2d at 1104 (syllabus, ¶ 2).

⁶⁹“[Post-release control is] part of the actual sentence, unlike bad time, where a crime committed while incarcerated resulted in an additional sentence not imposed by the court. In other words, the court imposes the full sentence and the APA determines whether violations merited its imposition. The defendant is fully informed at sentencing that violations of post-release control will result in, essentially, ‘time and a half.’” *Id.* at 511, 733 N.E.2d at 1109.

⁷⁰The dissent in *State ex rel. Bray v. Russell*, 89 Ohio St. 3d 132, 139, 729 N.E.2d 359, 364 (Cook, J., dissenting) raised this issue. Although not discussed by the majority, the dissent argued that both § 2967.11(B) and § 2929.19(B)(3)(b) require the sentencing judge to inform defendants of the possibility of bad-time penalties. Thus, reasoned the dissent, bad-time penalties are part of the original judicially imposed sentence. *See also Woods*, 89 Ohio St. 3d at 518, 733 N.E.2d at 1114 (Cook, J., dissenting) (contending that both bad-time and post-release control provisions are imposed by the judicial, not executive, branch).

⁷¹*See Catherine Candisky, Tort Reform Bill Headed to Governor*, COLUMBUS DISPATCH, Sept. 27, 1996, at 1B.

⁷²*See Lee Leonard, Governor Signs Tort Overhaul*, COLUMBUS DISPATCH, Oct. 29, 1996, at 1C.

⁷³Prior to the passage of H.B. 350, the Ohio Supreme Court had invalidated many tort reform measures on state constitutional grounds. *See State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 457 & n.5, 715 N.E.2d 1062, 1072 & n.5 (1999). Many of those in the know predicted that portions or all of H.B. 350 would meet the same fate. *See Catherine Candisky, Tort Reform Legislation Might End Up in Court*, COLUMBUS DISPATCH, Sept. 5, 1996, at 1C.

⁷⁴86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999). There are many facets to this case which provide fertile ground for law review articles. In addition to a separation of powers concern, the court also used questionable methods in asserting jurisdiction and applying the “one-subject rule.” *See James Preston Schuck, Returning the “One” to Ohio’s “One-Subject” Rule*, 28 CAP. U.L. REV. 899 (2000) (discussing the “one-subject rule” as applied in *Sheward*); *Ohio*

constitutional history,⁷⁵ the majority analyzed specific provisions of the bill, beginning with statutes of repose.⁷⁶ The court stated that it had previously outlawed certain statutes of repose and that the Legislative Service Commission had informed the general assembly that the statutes in H.B. 350 might not pass “constitutional muster.”⁷⁷ The majority also noted that H.B. 350 contained an uncodified statement that expressed the intent of the legislature to repeal a statute of repose in light of the Ohio Supreme Court rulings. However, the statement added that the legislature was determined “to respectfully disagree with those holdings and to recognize the legal rationale set forth in the concurring-dissenting opinion.”⁷⁸ With this evidence, the court found that the general assembly had “brush[ed] aside a mandate of this court on constitutional issues as if it were of no consequence.”⁷⁹

The court used this analysis for six other components of H.B. 350.⁸⁰ From its review of these components, the court “advanced awkwardly from its scrutiny of

Supreme Court Strikes Down State General Assembly’s Tort Reform Initiative, 113 HARV. L. REV. 804 (2000) [hereinafter *Striking Down Tort Reform*] (analyzing jurisdictional, separation of powers, and “one-subject” implications of the decision). However, this Article will focus only on the separation of powers aspect.

⁷⁵The court initially examined Ohio constitutional law prior to the present constitution of 1851. After lamenting the injustices of a pro-legislature system exemplified by the 1802-1851 era, the court concluded by stating that “the Constitution of 1851 was inspired by an antipathy toward an all-powerful legislature,” and then proffered quotes from the 1851 constitutional convention to illustrate this conclusion. *See State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d at 462-67, 715 N.E.2d at 1076-79.

⁷⁶The court began by stating basic tenets of the separation of powers doctrine. *See id.* at 475, 715 N.E.2d at 1085 (“each of the three grand divisions of the government, must be protected from the encroachment of others”) (quoting *City of Euclid v. Jemison*, 28 Ohio St. 3d 157, 159, 503 N.E.2d 136, 138 (1986)). However, the court stopped there, saying, “[I]n light of the foregoing history, and with this principle in mind, we will proceed to examine the several aspects of Am. Sub. H.B. No. 350.” 86 Ohio St. 3d at 475, 715 N.E.2d at 1085. This is particularly bothersome because not only did the court ignore the presumption of constitutionality and innocent construction rule afforded legislation, *see State ex rel. Weinberger v. Miller*, 87 Ohio St. 12, 27-28, 99 N.E. 1078, 1079-80 (1912) (holding that a statute is presumed constitutional and will not be given an unconstitutional construction if one can be avoided), but it walked into an analysis anchored by a historical perspective which presumed the legislature to be a nefarious and power-hungry institution.

⁷⁷*See Sheward*, 86 Ohio St. 3d at 476, 715 N.E.2d at 1085.

⁷⁸*Id.* at 476-77, 715 N.E.2d at 1086.

⁷⁹*Id.* at 478, 715 N.E.2d at 1087.

⁸⁰*See id.* at 479, 715 N.E.2d at 1087-88 (stating that certificate of merit requirements were nullified in previous court decisions and contrary to the court-promulgated rules of civil procedure); *id.* at 480-82, 715 N.E.2d at 1088-90 (finding that informing the jury of a plaintiff’s collateral sources of recovery violates previous holdings); *id.* at 484, 715 N.E.2d at 1090-91 (finding that cap on punitive damages has been held invalid under the state constitution); *id.* at 485-90, 715 N.E.2d at 1091-95 (holding that impositions on damage caps contained in H.B. 350 violated previous court holdings); *id.* at 490-91, 715 N.E.2d at 1095-96 (stating that the legislature cannot force courts to adopt a summary judgment standard); *id.* at 491-92, 715 N.E.2d at 1096 (holding that the legislature cannot force courts to adopt rules of evidence).

seven individual provisions of H.B. 350 to declare that the reform act was unconstitutional in its entirety.”⁸¹ The court found that the legislature had “boldly seized the power of constitutional adjudication, appropriated the authority to establish rules of court and overrule judicial declarations of unconstitutionality, and . . . forbade the courts of the province of judicial review.”⁸² In conclusion, the majority reasoned that H.B. 350 “usurps judicial power in violation of the Ohio constitutional doctrine of separation of powers and, therefore, is unconstitutional.”⁸³

Chief Justice Moyer’s dissent argued that the general assembly had not usurped the judiciary’s authority. Noting that the general assembly has the exclusive authority to pass new laws, the dissent reasoned that even if the act was unconstitutional it did not mean that a violation of the separation of powers had occurred.⁸⁴ Chief Justice Moyer stated that the second law, although similar to the previous one that had been invalidated, was nevertheless a new and separate law and was not evidence of a failure to respect a prior dictate of the court.⁸⁵

II. MAKING SENSE OF SEPARATION OF POWERS IN OHIO

A. *The Separation of Powers—Defining the Conflict and Method of Scrutiny*

When analyzing a separation of powers controversy, framing the initial inquiry is essential to resolving the overall problem. Our initial inquiry asks what level or method of scrutiny to employ, and to do this we must look at the nature of the governmental actions. First, one should ask, “Is the conflict between two constitutional branches of government (i.e., legislative, executive, or judicial) or is it between one of these branches and an administrative body?”⁸⁶ If the conflict is between two of the three constitutionally mandated branches of government, one should ask, “Is the transgressor acting pursuant to legitimate authority or in spite of it? Is there any set of circumstances under which the action could be upheld?” If the conflict is between a constitutional branch and an administrative body ask, “Does the action of the administrative body violate the formal rules governing its authority?”

B. *Disputes Among the Legislative, Executive, and Judicial Branches*

When looking at interactions between constitutionally mandated branches it is important to examine the action of the accused branch. At one extreme, an action may never be permissible because its ill effect on one or both branches may be inherent and universal under all circumstances. In this instance a strictly formal

⁸¹*Striking Down Tort Reform*, *supra* note 74, at 804.

⁸²*Sheward*, 86 Ohio St. 3d at 492, 715 N.E.2d at 1096.

⁸³*Id.* at 494, 715 N.E.2d at 1097.

⁸⁴“Passage of such legislation is instead no more than the undertaking of a vain act: where a court finds an act to be violative of the constitution, it is a nullity, and has been from the time of its enactment.” *Sheward*, 86 Ohio St. 3d at 527, 715 N.E.2d at 1120 (Moyer, C.J., dissenting).

⁸⁵*See id.* at 528-29, 715 N.E.2d at 1120-21 (Moyer, C.J., dissenting).

⁸⁶For conflicts between a constitutionally delineated branch of government and an administrative body, see *infra* Part II(C).

analysis is taken because it would be a violation of a court's duty to fashion a functional balance of competing interests at the cost of permanently debasing one branch's constitutionally apportioned power. At the other end of the spectrum, one branch may be acting constitutionally but in the process interfere with another branch's prerogatives. In these cases, courts are apt to employ a functional analysis to reach an equitable result.

Some actions may not be permissible because they will always generate a defect in the constitutional structure of one or more branches. Such examples occur when specific text of the constitution or a statute is violated. In *State ex rel. Montgomery v. Rogers*,⁸⁷ the Ohio Supreme Court found that the legislature, by requiring courts to fix the salaries of county surveyors, had offended Article II, Section 20 of the Constitution, which requires the general assembly to "fix the term of office and compensation for all officers."⁸⁸ This type of separation of powers violation is pervasive. There could be no set of circumstances in which it could be allowed, save for an amendment of Article II, Section 20. Rightfully, the *Rogers* court avoided employing a functional balancing test in light of the clear authority.

A formalist approach is also normally employed when one branch annexes a power of another branch in an attempt to "aggrandize" itself.⁸⁹ *Bowsher v. Synar*⁹⁰ is a notable example of this approach. In *Bowsher*, Congress was accused of increasing its own power base through controlling executive actions by way of the Comptroller General. If this charge were true, Congress would certainly not be exercising a constitutionally assigned function because its breadth of control is limited to legislative concerns.

The Ohio Supreme Court characterized the controversy in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*⁹¹ as an aggrandizement case. The majority framed the question in *Sheward* as whether the general assembly had declared its own legislation constitutional by issuing uncodified statements of intent and re-enacting overruled legislation. Such action, the court reasoned, is an impermissible aggrandizement of legislative power at the expense of the judiciary. As will be seen, the Ohio Supreme Court's characterization of the *Sheward* case is highly suspect.

On the other extreme of separation of powers cases are interference cases, which normally demand a functionalist analysis. These cases occur when one branch is exercising a constitutionally assigned function but, while doing so, happens to interfere with a co-ordinate branch.⁹² In these instances, the United States Supreme

⁸⁷71 Ohio St. 203, 73 N.E. 461 (1905).

⁸⁸OHIO CONST. art. II, § 20.

⁸⁹The rule that one branch may not annex or increase its power at the expense of another branch is also commonly referred to as the "anti-aggrandizement" principle. See Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 345-348 (1998).

⁹⁰478 U.S. 714 (1986). See *supra* notes 32-44 and accompanying text.

⁹¹86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999).

⁹²See Alan B. Morrison, *A Non-Power Look at Separation of Powers*, 79 GEO. L.J. 281 (1990) ("Even when there has been no textual violation and one branch has not exercised power given by the Constitution to another, separation of powers problems may still exist if a

Court has adopted a more lenient standard of examination that focuses on whether or not a “core” function has been interfered with.⁹³ The Ohio Supreme Court, when ruling on cases of interference, employs a functional balancing of interests as well.⁹⁴ This balancing approach is best exemplified by the “power of the purse” cases,⁹⁵ wherein the Ohio Supreme Court has adopted a scheme that places the burden of disproving the reasonableness of a court’s budget request on the challenger, which is normally the legislative body dispensing the court’s annual funding.⁹⁶ Thus, the courts are insulated from what could otherwise be a coercive influence when the legislature carries out its constitutionally assigned duty of appropriating funds.

The Ohio Supreme Court has also required a strong showing of interference when the legislature enacts a law that, although constitutionally permissible, could impair the judiciary. In *State v. Pachay*,⁹⁷ the court stated that the Ohio General Assembly had the constitutional power to enact “speedy trial statutes” which set definitive guidelines for enforcing a defendant’s constitutional right to a prompt trial.⁹⁸ The court also recognized that with increasing caseloads such statutes had the potential to interfere with court business.⁹⁹ However, the present caseload and

statute ‘disrupts the proper balance between coordinate branches.’”) (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)).

⁹³See *Nixon v. Administrator of General Services* 433 U.S. 425, 443 (1977) (stating that courts must determine “the extent to which [the statute] prevents the . . . [b]ranch from accomplishing its constitutionally assigned functions,” and then “determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress”).

⁹⁴But note that the looser standard applied to cases of interference is not the standard used for all separation of powers cases. Compare *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (employing a more functional approach in an interference case) with *Bowsher v. Synar* 478 U.S. 714 (1986) (using a stricter, less flexible standard for an encroachment case). Some Ohio Supreme Court justices have called for a blanket use of the *Nixon* style analysis. See *State ex rel. Bray v. Russell*, 89 Ohio St. 3d 132, 137, 729 N.E.2d 359, 363 (2000) (Cook, J., dissenting) (arguing for a flexible and pragmatic approach as applied in *Nixon*). However, the U.S. Supreme Court does not universally apply this low level of scrutiny.

⁹⁵The potential for undue influence by the entity that “pays the bills” is well taken. James Madison wrote, “[A]s the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.” THE FEDERALIST NO. 48, at 278 (Clinton Rossiter ed., 1961).

⁹⁶Judicial budget requests are presumed to be reasonable and it is the burden of the appropriator to prove otherwise. See, e.g., *State ex rel. Johnston v. Taulbee*, 66 Ohio St. 2d 417, 423 N.E.2d 80 (1981); *State ex rel. Edwards v. Murray*, 48 Ohio St. 2d 303, 358 N.E.2d 577 (1976); *State ex rel. Giuliani v. Perk*, 14 Ohio St. 2d 235, 237 N.E.2d 397 (1968).

⁹⁷64 Ohio St. 2d 218, 416 N.E.2d 589 (1980).

⁹⁸See *id.* (syllabus).

⁹⁹See *id.* at 221, 416 N.E.2d at 591.

resulting interference was not so great as to warrant the statute's invalidation on separation of powers grounds.¹⁰⁰

A functional balancing test is also seen when the constitutionally permissible actions of the executive branch somehow interfere with the business of the courts. In *State ex rel. Gilligan v. Hoddinott*,¹⁰¹ a lower state court issued an order preventing anyone from interfering with plaintiff Ohio Inns' performance of contractual obligations, which consisted of operating and managing facilities in Ohio state parks.¹⁰² When an unrelated Ohio Inns labor dispute turned violent, the Governor had the parks closed and effectively violated the lower court order.¹⁰³ The Ohio Supreme Court upheld the constitutionally permissible actions of the Governor, even though they interfered with the court order, and in doing so the court applied a functional balancing test between public safety and contract rights.¹⁰⁴

C. *The Administrative Conundrum—A Fourth Branch of Government?*

Roosevelt's New Deal and the complexities of effective government in the modern age have given rise to something that Montesquieu and the Founding Fathers apparently never contemplated—the Administrative State. In a strictly theoretical sense, the exercise of administrative power cannot function in a tripartite government because “what may be denominated as such must fall within one of the three great powers recognized by the constitution, namely, executive, legislative, or judicial.”¹⁰⁵ The observations of Justice Jackson are particularly illuminating on this subject:

[Administrative bodies] have become a veritable fourth branch of the government, which has deranged our three-dimensional thinking. Courts have differed in assigning a place to the seemingly necessary bodies of our constitutional system. Administrative agencies have been called quasi-legislative, quasi-executive, or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying “quasi” is implicit with the confession that all recognized classifications have broken down, and “quasi” is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.¹⁰⁶

In any event, actions of administrative agencies are best reviewed under a functional rather than a formal approach, if for no other reason than trying to compartmentalize every administrative action into a legislative, executive, or judicial

¹⁰⁰*See id.* at 222-23, 416 N.E.2d at 592.

¹⁰¹36 Ohio St. 2d 127, 304 N.E.2d 382 (1973).

¹⁰²*Id.* at 128, 304 N.E.2d at 383.

¹⁰³*Id.* at 129, 304 N.E.2d at 383.

¹⁰⁴“[The] Governor’s exercise of discretion was aimed at protecting state citizens and state property from harm. That interest far outweighs the interest which Ohio Inns has in protecting its contract rights.” *Id.* at 132, 304 N.E.2d at 385.

¹⁰⁵2 OHIO JUR. 3d § 10 (1985).

¹⁰⁶*FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952).

subset is a futile exercise.¹⁰⁷ However, it is the imposition of a set of formal rules, such as legislative supervision and judicial review, that aids us in our analysis of the relationships between agencies and constitutionally defined branches and helps to guard against tyranny.¹⁰⁸ For instance, the general assembly may not delegate legislative power to an administrative agency,¹⁰⁹ and agencies exercising quasi-judicial functions can have their rulings appealed to an Article IV state court to guarantee due process even where the agency's enabling legislation does not provide for review.¹¹⁰

A cardinal example of the relationship between the judiciary and administrative agencies is *City of South Euclid v. Jemison*.¹¹¹ Under section 4509.101(B) of the Ohio Revised Code, a court was required to impose punishment on individuals who were found guilty of traffic offenses and could not provide proof of insurance.¹¹² However, after the court had determined that a defendant had committed a traffic offense and was not financially responsible, the defendant was allowed to appeal the conviction to the registrar of motor vehicles.¹¹³ The registrar was permitted to overturn the court's decision if it felt that the defendant was not guilty of driving without insurance.¹¹⁴

¹⁰⁷In fact, it has been observed that since "a typical administrative agency exercises many types of power, including executive, legislative, and judicial power, a strict application of the theory of separation of powers would make the very existence of such an agency unconstitutional." KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 1.09, at 65 (1958).

¹⁰⁸"The protection against tyranny comes, not from separating the powers, but from our system of legislative supervision of administrative action and from our system of judicial review of administrative action." KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TEXT* 23 (1959).

¹⁰⁹See *State ex rel. Foster v. Evatt*, 144 Ohio St. 65, 56 N.E.2d 265 (1944). This principle is commonly referred to as the "non-delegation" doctrine. See Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 358-364 (1998).

¹¹⁰See *State ex rel. Tyler v. McMonagle*, 25 Ohio St. 3d 13, 494 N.E.2d 1144 (1986).

¹¹¹28 Ohio St. 3d 157, 503 N.E.2d 136 (1986).

¹¹²See OHIO REV. CODE § 4509.101(B).

¹¹³OHIO REV. CODE § 4509.101(B)(3)(a) requires the registrar to notify the defendant, post conviction, that he has an opportunity to contest the court's finding. The defendant was allowed to "submit a statement . . . that he did not operate or permit operation of the motor vehicle at the time of the offense." The registrar was then permitted to "make an investigation to determine . . . whether there is a reasonable basis for believing that the person has operated or permitted the operation of the motor vehicle at the time of the traffic offense without the operation being covered by proof of financial responsibility. If the registrar determines that such a reasonable basis exists, the registrar shall afford the person an opportunity for hearing... to determine whether the person has violated . . . this section." *Id.*

¹¹⁴OHIO REV. CODE § 4509.101(D) provides: "Any order of suspension or impoundment issued under this section . . . may be terminated if the registrar determines upon a showing of proof of financial responsibility that the operator . . . was in compliance with division (A)(1) of this section."

The Ohio Supreme Court concluded that this scheme violated the separation of powers on two levels. First, even if a court determined that the defendant had “operated or permitted the operation of a motor vehicle without appropriate financial responsibility at the time of the traffic offense,” the registrar of motor vehicles was allowed to review this finding and grant the defendant an opportunity for a hearing.¹¹⁵ Secondly, the court found that allowing the registrar to reverse a judicial determination was equally antithetical to the doctrine of separation of powers because it wrongly conferred “appellate jurisdiction upon an administrative agent or agency from a decision rendered by an Ohio court.”¹¹⁶

Thus, even if one accepts the notion that administrative agencies are in reality a “fourth” branch of government,¹¹⁷ it is a branch that is kept intentionally subservient to its constitutionally derived counterparts. Although an administrative agency may promulgate rules, it cannot enact legislation, and the legislature has the right to redefine an agency’s structure and objectives.¹¹⁸ An agency’s decisions are reviewable in court, but that same agency may neither review a court’s ruling¹¹⁹ nor limit the inherent powers of the judiciary.¹²⁰ In the end, it would seem that while administrative agencies may defy the definition of separation of powers, they serve its underlying purpose in two respects: Their expertise in a given area promotes efficiency, and their powers, although blended, are kept in check so as to avoid tyranny.

D. Analyzing the Roles and Actions of Government Actors

1. Executive/Administrative Actions—*State ex rel. Bray v. Russell* and *Woods v. Telb*

In cases involving agencies, the defendant will often be cast in a dual role of administrative body and executive branch organ. In such instances, the agency must

¹¹⁵The court made this observation in reference to § 4509.101(B)(3)(a) and noted that the registrar not only has the power to accept a statement of the defendant contesting the court’s finding but also to grant the defendant a hearing on the merits of his complaint. *See City of South Euclid v. Jemison*, 28 Ohio St. 3d 157, 162, 503 N.E.2d 136, 140 (1986).

¹¹⁶*See id.* at 162, 503 N.E.2d at 140 (quoting *State ex rel. Shafer v. Otter*, 106 Ohio St. 415, 140 N.E. 399 (1922)).

¹¹⁷The President’s Committee on Administrative Management reported in 1937 that administrative bodies constituted a “headless ‘fourth branch’ of Government.” PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT ON ADMINISTRATIVE AGENCIES 39 (1937).

¹¹⁸*See State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St. 3d 225, 239, 631 N.E.2d 582, 593 (1994) (stating that the General Assembly may restructure an agency once they have created it).

¹¹⁹*See City of South Euclid v. Jemison*, 28 Ohio St. 3d 157, 503 N.E.2d 136 (1986).

¹²⁰*See State v. Hochhausler*, 76 Ohio St. 3d 455, 668 N.E.2d 457 (1996) (holding that an administrative action cannot limit inherent judicial powers, in this case the granting of a stay); *State v. Warner*, 55 Ohio St. 3d 31, 45, 564 N.E.2d 18, 32 (1990) (finding that the issuing of subpoenas is a ministerial as opposed to inherent judicial function and a non-judicial officer may grant them without violating the separation of powers).

satisfy the separation of powers doctrine on two levels. With respect to an agency's administrative status we ask, "Does the action of the administrative body violate the formal rules governing its authority?" With respect to the agency's executive branch status we ask, "Is the transgressor acting pursuant to any legitimate authority or in spite of it? Is there any set of circumstances under which the action could be upheld?"

The language of *State ex rel. Bray v. Russell*¹²¹ can create the illusion that divergent conclusions will be reached depending on the method of analysis employed. The basic question is whether or not the executive branch, by way of an administrative agency, may impose punishment on a prisoner outside the scope of a judicially imposed sentence. The clear answer is no. While it is accepted in Ohio that the executive branch is empowered to carry out a sentence after it is imposed,¹²² the sentencing itself is a judicial function.¹²³

However, even under a functionalist analysis it is not clear that the result would be any different. The *Bray* dissent advocated an approach that would find a separation of powers violation only if one branch prevented another from carrying out its constitutionally assigned functions.¹²⁴ Although it is not always clear what amounts to a constitutionally assigned function,¹²⁵ it seems undeniable that the determination of guilt and sentencing of criminals is a function of the judiciary.

The functionalist argument in *Bray* does gain momentum when analyzed in conjunction with *Woods v. Telb*.¹²⁶ *Woods*, which was decided shortly after *Bray*, upheld a statute allowing the parole board to implement post-release control because it was part of the prisoner's original sentence.¹²⁷ This raises the question of whether, had the trial court simply informed the prisoner during sentencing that he could be subjected to bad-time penalties imposed by the parole board, the statute would have been constitutional. If so, it seems contrary to notions of expediency and efficiency

¹²¹89 Ohio St. 3d 132, 729 N.E.2d 359 (2000).

¹²²"[H]aving decided and the decision having become final — the judicial function ceased in that case. The case was no longer pending. The enforcement of the judgment was no part of the judicial function. That duty devolved upon the executive department and the duty was ministerial and not judicial in its nature." *Long & Allstatter Co. v. Willis*, 52 Ohio App. 299, 302-03, 3 N.E.2d 910, 912 (1935).

¹²³*See State ex rel. Bray v. Russell*, 89 Ohio St. 3d 132, 136, 729 N.E.2d 359, 362 (2000) ("The determination of guilt in a criminal matter and the sentencing of a defendant convicted of a crime are solely the province of the judiciary.").

¹²⁴*See id.* at 137, 729 N.E.2d at 363 (Cook, J., dissenting).

¹²⁵*See State v. Hochhausler*, 76 Ohio St. 3d 455, 668 N.E.2d 457 (1996). The court split 5-2 on whether or not the ability to grant a judicial stay is an "inherent" court function.

¹²⁶89 Ohio St. 3d 504, 733 N.E.2d 1103 (2000).

¹²⁷"Those terms [post-release control] are part of the actual sentence, unlike bad-time, where a crime committed while incarcerated resulted in an additional sentence not imposed by the court. In other words, the court imposes the full sentence and the APA determines whether violations merited its imposition. The defendant is fully informed at sentencing that violations of post-release control will result in, essentially, 'time and a half.'" *Id.* at 511, 733 N.E.2d at 1109.

to hold that the executive usurped the judiciary's role because the trial court did not explicitly state that bad-time was included with the original sentence.

The court may have refused to apply a relaxed standard of review because the issue closely revolved around a defendant's constitutional right to due process. The Court of Appeals for Trumbull County in *White v. Konteh*¹²⁸ found the bad-time provision to be unconstitutional because it allowed an inmate to be tried and imprisoned by someone other than a "neutral magistrate."¹²⁹ This due process concern, although not expressly addressed by the *Bray* court, may have influenced the court's opinion and triggered a stricter scrutiny.¹³⁰ Even so, finding that the judiciary implicitly sentenced defendants to bad-time provisions simply to effect an efficient result may lead the court onto a slippery slope that it wisely avoided.¹³¹

What is troubling about the court's decision is its apparent failure to enforce a duty of the trial court and instead shifting the blame to the executive branch. The *Bray* court held that bad-time provisions were not part of the original sentence, but distinguished and upheld the statute in *Woods* on the basis that it required the trial court to inform the defendant during sentencing of post-release control.¹³² But as the dissent in *Bray* noted, judges were required by statute to inform defendants of the possibility of bad-time penalties at the sentencing hearing and prior to accepting a defendant's plea.¹³³ Accordingly, there is no meaningful distinction between the requirements for defendant notification in the statutes at issue in *Bray* and in *Woods*. When this fact is taken into account, our initial questions are answered in favor of the parole board. The administrative agency is acting within the formal rules governing its authority. Additionally, the executive branch is carrying out its constitutionally assigned function of executing a judicially imposed sentence.

The difference appears in the actual notification, which was given in *Woods* but apparently not in *Bray*.¹³⁴ Although it is impermissible for the executive to impose

¹²⁸No. 99-T-0020, 1999 WL 587976 (Ohio Ct. App. Mar. 23, 1999).

¹²⁹"[I]t should also follow that such a person should not be subjected to additional incarceration for a new offense unless he has been tried before a neutral magistrate." *Id.* at *5.

¹³⁰The court seemed to be unusually concerned with the rights of individuals rather than simply limiting the discussion to the roles and duties of the various branches of government. *See Bray*, 89 Ohio St. 3d at 135, 729 N.E.2d at 362 (stating that the principle of separation of powers was designed to protect people, not branches of government). This type of reasoning is conspicuously absent in most separation of powers cases.

¹³¹*See generally* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

¹³²*Compare Bray*, 89 Ohio St. 3d at 135, 729 N.E.2d at 362 (finding that the bad-time penalty is an entirely separate punishment from the original sentence) *with Woods*, 89 Ohio St. 3d at 513, 733 N.E.2d at 1110 ("Further, we hold that pursuant to R.C. 2967.28(B) and (C), a trial court must inform the defendant at sentencing or at the time of a plea hearing that post-release control is part of the defendant's sentence.").

¹³³*See Bray*, 89 Ohio St. 3d at 138-39, 729 N.E.2d at 364 (Cook, J., dissenting) (noting that OHIO REV. CODE § 2967.11(B) implements bad-time provisions as part of the originally imposed sentence and that § 2929.19(B)(3)(b) and § 2943.032 require a trial judge to inform defendants of the possibility of bad-time penalties prior to sentencing).

¹³⁴"Because the record clearly indicates that the defendant was advised of discretionary post-release control both in his signed plea form and in his sentencing entry, we find no

punishment not included in the judiciary's sentence, the omission of the express inclusion of the bad-time provision seems to be an oversight of the trial court. By overruling the statute rather than acknowledging a failure within its own branch, the *Bray* court has arguably committed its own separation of powers breach.

2. Legislative Actions—*State ex rel. Ohio Academy of Trial Lawyers v. Sheward*

The analysis employed in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*¹³⁵ is a paradigm that should almost never be applied, and Ohio courts would be wise to abandon the approach lest it become a fashionable way to illustrate a separation of powers violation. It should be noted that other aspects of the *Sheward* decision have generated controversy in both the popular media and academia,¹³⁶ but those issues are not addressed in this Article.¹³⁷ Focusing strictly on a separation of powers violation, this Article argues that the *Sheward* opinion cannot be maintained under either a formal or functional analysis.

Sheward involved a conflict between two constitutional branches of government. Therefore, we begin with the question appropriate for such cases: "Is the transgressor acting pursuant to any legitimate authority or in spite of it? Is there any set of circumstances under which the action could be upheld?" The majority opinion held that H.B. 350 "intrudes upon judicial power by declaring itself constitutional, by reenacting legislation struck down as unconstitutional, and by interfering with this court's power to regulate court procedure."¹³⁸ Each of these contentions will be analyzed in turn.

a. Statements of Intent

The *Sheward* court found certain uncodified statements of intent and legislative findings within H.B. 350 to be particularly egregious and demonstrative of legislative intent to usurp judicial power.¹³⁹ The court interpreted these statements as legislative declarations of constitutionality,¹⁴⁰ which is something only the judiciary

violation of the separation of powers doctrine in this case." *Woods*, 89 Ohio St. 3d at 513, 733 N.E.2d at 1110.

¹³⁵86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999).

¹³⁶See, e.g., Basil Loeb, *Abuse of Power: Disregarding Traditional Legal Principles to Invalidate Tort Reform*, 67 DEF. COUNS. J. 501 (2000); *supra* note 74.

¹³⁷See *supra* note 74.

¹³⁸*Sheward*, 86 Ohio St. 3d at 462, 715 N.E.2d at 1076.

¹³⁹See *id.* at 459-61 n.7, 715 N.E.2d at 1073-75 n.7 (listing several offensive sections of the bill) ("[T]he bill includes a number of uncodified sections that contain various findings and statements of intent with regard to the constitutionality of Am.Sub.H.B. No. 350 and some of its more controversial provisions. [W]e will examine the substance of these declarations, as well as the extent to which they reveal an attempt to absorb the authority of the judicial branch of government."). See also H.B. 350, § 5, 121st Gen. Ass., 1995-96 Reg. Sess. (Ohio 1996) (detailing legislative findings and statements of intent).

¹⁴⁰See *Sheward*, 86 Ohio St. 3d at 478, 715 N.E.2d at 1086 (finding that the General Assembly, with regard to statutes of repose, had stated an intent to brush "aside a mandate of this court on constitutional issues as if it were of no consequence"); *id.* at 479, 715 N.E.2d at 1087 (holding that a legislative finding which declares statements of merit to be a substantive, rather than procedural, requirement is not binding on the judiciary); *id.* at 490, 715 N.E.2d at

may do.¹⁴¹ Therefore, the majority reasoned, the legislature had invaded the exclusive province of the courts.¹⁴²

Chief Justice Moyer's dissent acknowledged the majority's position, but found the legislative statements to be no more than an expression of disagreement with the court's prior decisions.¹⁴³ Furthermore, the dissent argued that the majority had confused legislative with judicial findings and asserted that the commentary included in H.B. 350 could be construed as a simple statement of public policy.¹⁴⁴

This divergence of conclusions as to the meaning of the legislative statements is particularly bothersome because the court failed to address standard rules of statutory interpretation. In Ohio, legislative enactments are not only presumed to be constitutional,¹⁴⁵ but they are given a constitutional construction if one is available.¹⁴⁶ The majority felt comfortable in dismissing the Chief Justice's interpretation by reasoning that if the substantive law of H.B. 350 invaded the sanctuary of the judiciary by reenacting unconstitutional legislation, it was likely that the uncodified statements of H.B. 350 harbored an unlawful intent as well.¹⁴⁷ Although the court may have applied the "innocent construction rule" silently and still found the questionable sections unconstitutional "beyond a reasonable doubt,"¹⁴⁸ it is entirely

1094-95 (stating that legislative findings and statements of intent as to the constitutionality of limits on general damages invade the judicial province); *id.* at 491, 715 N.E.2d at 1095 (ruling that the legislature may not intend to establish a judicial procedural rule such as the standard for summary judgment).

¹⁴¹*See, e.g.,* *Beagle v. Walden*, 78 Ohio St. 3d 59, 62, 676 N.E.2d 506, 508 (1997) ("[I]nterpretation of the state and federal Constitutions is a role exclusive to the judicial branch.").

¹⁴²"The General Assembly has [attempted] to establish itself as the final arbiter of the validity of its own legislation. It has boldly seized the power of constitutional adjudication." *Sheward*, 86 Ohio St. 3d at 492, 715 N.E.2d at 1096.

¹⁴³"Judicial power is no more infringed by the General Assembly's statements of intent than by the expression of disagreement with our rulings by a legislator in debate over proposed legislation, or in a newspaper editorial. The majority's indignation with the General Assembly's expressions of disagreement with prior decisions of this court appears founded on mere pique." *Id.* at 529, 715 N.E.2d at 1121 (Moyer, C.J., dissenting). *See also* Jonathan L. Entin, *Supreme Court Not Out of Line on Tort Reform Ruling*, CRAIN'S CLEVELAND BUSINESS, Aug. 30, 1999, at 11 (stating that the General Assembly may have been trying to generate a dialogue with the supreme court).

¹⁴⁴*See Sheward*, 86 Ohio St. 3d at 529-30, 715 N.E.2d at 1121.

¹⁴⁵*See State v. Hochhausler*, 76 Ohio St. 3d 455, 458, 668 N.E.2d 457, 462 (1996).

¹⁴⁶*See State ex rel. Steffen v. Kraft*, 67 Ohio St. 3d 439, 440, 619 N.E.2d 688, 689 (1993).

¹⁴⁷*See Sheward*, 86 Ohio St. 3d at 505-06, 715 N.E.2d at 1105-06.

¹⁴⁸*State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955) (syllabus ¶ 1) ("An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.").

unclear why the offending portions could not have been severed from the remainder of the bill as is required under Ohio law.¹⁴⁹

Any legislative provision (other than a constitutional amendment) that purports to declare a law constitutional or brazenly rejects a prior constitutional ruling is an indignity to the separation of powers doctrine. However, such a provision is easily severable from the legislation and should not be thought to infect, by reason of its offensiveness, the remainder of the law. To illustrate, imagine that the Governor of Ohio calls a press conference and announces that he intends to exercise an absolute veto. The governor may not exercise an absolute veto and to do so would undoubtedly infringe on the general assembly's constitutional power. Should his stated intent be ignored and his veto given the constitutional weight it deserves or would the entire act be considered *ultra vires*? What if the veto had all the trappings of a constitutional act and even the most sophisticated observer could not detect fault with the deed but for the Governor's stated intent? What if the Governor did not proclaim his intent, but held it in his heart as he signed the order? Would an unconstitutional intent nullify an otherwise legal act?

In all practical respects, enforcing the veto to its lawful extent would not promote tyranny or interfere with the legislature's constitutionally assigned functions. To deny the veto would in itself present a separation of powers quandary. The separation of powers doctrine would prevent an absolute veto intention from metamorphosing into an unconstitutional act, but it is the act that concerns us. A branch cannot aggrandize itself, intrude upon, or interfere with another branch through intent, but only through an overt act. Since the act is so easily divorced from the intention, the illegitimacy of the latter should not preclude the former.¹⁵⁰

b. Legislative Reenactment

Laws which are mirror images of legislation previously struck down could conceivably offend the separation of powers doctrine, but courts should abstain from analyzing such situations under a separation of powers theory. To do so does not advance understanding of law, because in virtually all cases separation of powers is not the primary offense. Indeed, only after a thorough examination of the underlying offense will a separation of powers violation actually reveal itself, after which the separation of powers issue becomes peripheral.

In its opinion, the *Sheward* court stated that the general assembly had reenacted legislation that the court previously found unconstitutional, thus violating the separation of powers. This, the *Sheward* majority reasoned, begins when the legislature initially enacts law A, which the court later finds unconstitutional because

¹⁴⁹“[A] statute may be invalid in part, by reason of some provisions being repugnant to the state Constitution, and valid as to the residue, where it appears that the invalid part is an independent provision, not in its nature and connection essential to the other parts of the statute, nor so related to the general purpose of the enactment as to warrant the conclusion that the Legislature would have refused to adopt it with the invalid part stricken out.” *State ex rel. Greenward Realty Co. v. Zangerle*, 135 Ohio St. 533, 540, 21 N.E.2d 662, 666 (1939) (quoting *Gager v. Prout*, 48 Ohio St. 89, 108, 26 N.E. 1013, 1016 (1891)). The legislature has also expressed its will that this rule be the law of Ohio. *See* OHIO REV. CODE § 1.50.

¹⁵⁰This is not to say that an unconstitutional intention should not serve as evidence of an unconstitutional act. A suspect intention should naturally raise a “red flag” in the mind of the judge as to the legality of the underlying act.

it offends a provision of the Ohio Constitution. The legislature then passes a similar law B, which the court finds to be essentially a reenactment of law A.¹⁵¹ Because the legislature had reenacted a law which was previously found unconstitutional, the legislature had ignored the dictates of the supreme court, something which the separation of powers doctrine would not allow.¹⁵²

The dissenting Chief Justice argued that the legislature had the constitutional right to pass a separate, though similar, statute as long as it has not ignored a direct order of the court.¹⁵³ If the second law does contravene the constitution, it is a “nullity” from its inception and can never have the capability to violate the doctrine of separation of powers.¹⁵⁴ The Chief Justice insisted that the legislature will always have the power to pass law B, even if it is unconstitutional.¹⁵⁵ However, should the law offend the constitution it will be overruled by the higher law, in this case the constitution as interpreted in opinion A. Since law B is a nullity from the beginning,

¹⁵¹This is exactly the phenomenon described by the *Sheward* court. See *Sheward*, 86 Ohio St. 3d at 462, 715 N.E.2d at 1076 (“Am.Sub.H.B. No. 350 intrudes upon judicial power . . . by reenacting legislation struck down as unconstitutional. . .”). See also *id.* at 476-78, 715 N.E.2d at 1085-87 (finding that H.B. 350 reenacts statutes of repose that were declared unconstitutional in *Brennaman v. R.M.I. Co.*, 70 Ohio St. 3d 460, 639 N.E.2d 425 (1994)); *id.* at 479-82, 715 N.E.2d at 1088-90 (holding that H.B. 350’s requirements for jury award reduction in light of collateral benefits are not materially different from legislation overruled in *Pryor v. Webber*, 23 Ohio St. 2d 104, 263 N.E.2d 235 (1970) and *Sorrell v. Thevenir*, 69 Ohio St. 3d 415, 633 N.E.2d 504 (1994)); *id.* at 483-85, 715 N.E.2d at 1090-91 (ruling H.B. 350’s limits on punitive damages to be essentially the same legislation outlawed in *Zoppo v. Homestead Ins. Co.*, 71 Ohio St. 3d 552, 644 N.E.2d 397 (1994) and *Williams v. Aetna Fin. Co.*, 83 Ohio St. 3d 464, 700 N.E.2d 859 (1998)); *id.* at 485-90, 715 N.E.2d at 1091-95 (finding the provisions for general damage limitations reenacted in H.B. 350 to be similar to those struck down in *Morris v. Savoy*, 61 Ohio St. 3d 684, 576 N.E.2d 765 (1991)).

¹⁵²The majority reasoned that in reenacting legislation that was previously held unconstitutional, the General Assembly was in effect ignoring or, at best, sidestepping a binding ruling of the court. See *Sheward*, 86 Ohio St. 3d at 505-06, 715 N.E.2d at 1105.

¹⁵³Ignoring a direct order of the court, the Chief Justice reasoned, can only happen if the first statute is enforced despite the existence of a court opinion declaring it unlawful. See *id.* at 528, 715 N.E.2d at 1120 (Moyer, C.J., dissenting) (“Adoption of a statute similar to one already struck down does not contradict a prior judgment of this court invalidating the first statute. The fact remains that two separate statutes are involved, passed in different sessions of the General Assembly, by different legislators, and having different effective dates.”).

¹⁵⁴ “[T]he General Assembly [cannot] usurp judicial power by the act of adopting unconstitutional statutes. Passage of such legislation is instead no more than the undertaking of a vain act: where the court finds an act to be violative of the constitution, it is a nullity, and has been from the time of its enactment.” *Id.* at 527, 715 N.E.2d at 1120 (Moyer, C.J., dissenting). See also *Striking Down Tort Reform*, *supra* note 74, at 806 (“[T]he Chief Justice argued from his own lexicon that to the extent that the General Assembly reenacted statutes already deemed unconstitutional . . . such reenactment did not usurp judicial power; rather, such action is non-action, ‘a nullity’ in constitutional terms.”).

¹⁵⁵ “Although it is desirable that a legislature make a good-faith effort to enact law that is constitutional, the General Assembly has the right to enact legislation even if the constitutionality of that legislation is questionable.” *Sheward*, 86 Ohio St. 3d at 528, 715 N.E.2d at 1120 (Moyer, C.J., dissenting).

it can never usurp the power of the judiciary. Therefore its eradication is based on the underlying infirmity, not because of separation of powers.

These two opinions offer contrasting answers to our initial question. The majority concluded that the legislature did not act pursuant to constitutional authority and that there is no set of circumstances wherein its actions could be upheld. In such cases, a formal approach such as the one advanced in *State ex rel. Bray v. Russell*¹⁵⁶ and *State ex rel. Montgomery v. Rogers*¹⁵⁷ is normally used. The dissent reasoned that the legislature's actions were within its constitutionally ascribed power. Under this conclusion, any interference with another branch's duties should be judged according to a functional test as employed in *State v. Pachay*¹⁵⁸ and *State ex rel. Gilligan v. Hoddinott*.¹⁵⁹

A formal analysis would arguably agree with Chief Justice Moyer. It is hard to see how the power of the judiciary is undermined, especially when it retains the power to declare legislative acts invalid. Also, by reason of its nonexistence, law B could not be before the court when law A was disputed and held unconstitutional. Technically the court decides only the matter before it, and although it may be wasteful to fashion law virtually identical to that which was held unconstitutional, the legislative act does not violate the doctrine of separation of powers because, in the most formal sense, it is not the same law.¹⁶⁰ Although it doesn't seem necessary for the second law to be "nullified" at the outset in order to prevent a usurpation of judicial power, whether it was in fact nullified is an ongoing question.¹⁶¹

From a functionalist point of view, the majority's argument is strengthened but still not convincing. It is conceivable that repeated reenactments of substantially similar legislation, even if the general assembly had the constitutional right to do so, could be the practical equivalent of refusing to enforce the supreme court's edict. In such a case both branches are exercising a constitutionally permissible power, but one happens to be interfering with the objectives of another. This would be less so if the disputed law centered around a generally debatable point rather than a clear

¹⁵⁶89 Ohio St. 3d 132, 729 N.E.2d 359 (2000).

¹⁵⁷71 Ohio St. 203, 73 N.E. 461 (1905).

¹⁵⁸64 Ohio St. 2d 218, 416 N.E.2d 589 (1980).

¹⁵⁹36 Ohio St. 2d 127, 304 N.E.2d 382 (1973).

¹⁶⁰“We [the judiciary] cannot intervene in the process of legislation and enjoin the proceedings of the legislative department of the state. That department is free to act upon its own judgment of its constitutional powers. We have not even advisory jurisdiction to render opinions upon mooted questions about constitutional limitations of the legislative function, and we will not presume to control the exercise of that function of government by the General Assembly, much less by the people, in whom all the power abides. The Legislature, having delegated authority, prescribed and limited by the Constitution, may exceed its authority by promulgating a law in conflict with the Constitution.” *Pfeifer v. Graves*, 88 Ohio St. 473, 487-88, 104 N.E. 529, 533 (1913).

¹⁶¹From a formal analysis, judicial power remains intact either way. Although a legal rationalist would insist that the law was nullified from its inception, a legal realist would argue that the law was valid until a court declared otherwise. See generally WILFRID E. RUMBLE, *AMERICAN LEGAL REALISM* (1968).

constitutional impossibility,¹⁶² or was a short-lived experiment rather than an absurdly protracted legislative effort.¹⁶³ Whether H.B. 350 was either of these is not entirely clear.¹⁶⁴

But these observations mask a more basic point. In order for a reenacted law to violate the separation of powers doctrine, it must also suffer from the same constitutional defect as the original law. Otherwise, it would not be in conflict with the court's constitutional interpretation as rendered in the original opinion. To say merely that the "General Assembly has circumvented our mandates"¹⁶⁵ is not enough. The original mandates must be reiterated, clarified, and elaborated to advance an understanding of the law.¹⁶⁶ Whether or not a separation of powers violation is present is a side issue.¹⁶⁷

c. Regulating Court Procedure

An undeniable separation of powers violation of H.B. 350 was the general assembly's attempts to regulate court procedure. The Ohio Constitution provides that rules governing court practice and procedure are to be adopted by the Ohio Supreme Court.¹⁶⁸ Several provisions of H.B. 350 attempted to impose procedural

¹⁶²See Entin, *supra* note 143, at 11 (stating that the "decisions this law [H.B. 350] was designed to overturn presented genuinely close legal questions").

¹⁶³See generally Stephen J. Werber, *Ohio Tort Reform Versus the Ohio Constitution*, 69 TEMPLE L. REV. 1155 (1996) (detailing the recent history of tort reform efforts in Ohio).

¹⁶⁴The majority uses especially strong language when describing the legislature's behavior, stating: "[E]ach [branch] has endeavored to comport with the principle of separation of powers and respect the integrity and independence of the other, that is, until now." *Sheward*, 86 Ohio St. 3d at 457-58, 715 N.E.2d at 1072-73. However, when analyzing various provisions of H.B. 350, the majority almost always discusses only one previously enacted law pertaining to the same subject. Nor is it apparent, given the 4-3 split in the opinion, that the court was dealing with clear cut issues.

¹⁶⁵*Sheward*, 86 Ohio St. 3d at 492, 715 N.E.2d at 1096.

¹⁶⁶The majority does examine the underlying issues for some of the provisions of H.B. 350, but used almost half of the opinion detailing the constitutional history of Ohio in an attempt to buttress its separation of powers claim. This almost assuredly compromised the court's analysis of the underlying constitutional infirmities of H.B. 350 which, considering that the analysis of a 156-page bill occupies only 11 pages of the North Eastern Reporter, appears somewhat anemic. See also *Striking Down Tort Reform*, *supra* note 74, at 806 ("Emphasizing separationist principles, the *Sheward* opinion advanced awkwardly from its scrutiny of seven individual provisions of H.B. 350 to declare that the reform act was unconstitutional in its entirety.").

¹⁶⁷The author argues that Ohio courts should not use a separation of powers approach when examining allegedly reenacted statutes. Only when the behavior of the general assembly is so outrageous as to effectively deny the legitimacy of a court's dispositive constitutional ruling should separation of powers even be considered. In those rare cases, further clarification of the underlying error may very well fall on deaf ears and an admonishment may be necessary. However, this stick should be used sparingly, because not only does it produce a distorted vision of the law but it fosters animosity between co-equal branches.

¹⁶⁸The Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. . . . All

and evidentiary rules.¹⁶⁹ In light of explicit constitutional language vesting this power in the judiciary, the legislature's attempt to annex this authority is indefensible.¹⁷⁰

III. CONCLUSION

In the end, "the difficulties of producing consistent, principled answers to these problems suggest that the concept of separation of powers provides less a rule of decision than a heuristic concept for structuring analysis."¹⁷¹ Perhaps it is best that the separation of powers concept is amorphous and that "it is practically impossible to distinctly define the line of demarcation between the different departments of government."¹⁷² Since the theory is so entangled with notions of civil government and liberty, rigorous debate should be welcomed.

But the concept need not be so abstract as to produce unsuitable real world results and indefensible theoretical conclusions. A separation of powers analysis should begin by identifying the governmental actors, whether they be executive, legislative, judicial, or an administrative branch. The appropriate threshold questions should then be asked and the actions of the alleged transgressor thoroughly analyzed. Evidence of legal authority for the action, or a lack of any legal bar, and proof that the action might be upheld under different facts favor the implementation of a functional solution. Where law, history, public policy, or a combination thereof prevent the contested action and demand a clear demarcation of duties, a formal approach is usually warranted.

laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." OHIO CONST. art. IV, § 5(B).

¹⁶⁹See *Sheward*, 86 Ohio St. 3d at 478-79, 715 N.E.2d at 1087-88 (noting that H.B. 350 attempts to impose a certificate-of-merit procedural requirement contrary to the rule enunciated by the Ohio Supreme Court in *Rockey v. 84 Lumber Co.*, 66 Ohio St. 3d 221, 611 N.E.2d 789 (1993)); *id.* at 490-91, 715 N.E.2d at 1095-96 (stating that H.B. 350 orders courts to impose a standard of summary judgment different than that established by the Ohio Supreme Court in *Horton v. Harwick Chem. Corp.*, 73 Ohio St. 3d 679, 653 N.E.2d 1196 (1995)); *id.* at 491-92, 715 N.E.2d at 1096 (finding that H.B. 350 attempts to rewrite an Ohio rule of evidence articulated by the Ohio Supreme Court in *Ede v. Atrium S. OB-GYN, Inc.*, 71 Ohio St. 3d 124, 642 N.E.2d 365 (1994)).

¹⁷⁰However, these provisions are also severable from the rest of H.B. 350.

¹⁷¹Entin, *supra* note 13, at 221. See also *DeRolph v. Ohio*, 93 Ohio St. 3d 309, 327, 754 N.E.2d 1184, 1203 (2001) (Douglas, J., concurring) ("Thus, it is clear that the concept of the separation of powers is a political doctrine rather than a technical rule of law.").

¹⁷²*Fairview v. Giffee*, 73 Ohio St. 183, 186-87, 76 N.E. 865, 866 (1905).